92-718

Supreme Court, U.S.
FILED
OCT 27 1992
OFFICE OF THE CLERK

Case No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

TERRY MORRIS,

Petitioner,

v.

LAWRENCE HILL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER HARM (INJURY OR DISEASE) IS AN ESSENTIAL ELEMENT OF A PRISONER'S EIGHTH AMENDMENT DEPRIVATION OF MEDICAL CARE CLAIM.

II. WHETHER THE MERE POSSIBILITY OF DEVELOPING A FUTURE INJURY OR DISEASE CAUSED BY A DENIAL OF MEDICAL ATTENTION IS A COGNIZABLE HARM FOR THE PURPOSE OF ESTABLISHING AN EIGHTH AMENDMENT DEPRIVATION OF MEDICAL CARE VIOLATION.

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OPINIONS AND JUDGMENTS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit, filed on May 1, 1992, in Case No. 90-3803, is reported as *Hill v. Marshall*, 962 F.2d 1209 (6th Cir. 1992), and is reproduced at A-1.

The post-trial Order of the United States District Court for the Southern District of Ohio, Western Division, entering Judgment for Plaintiff on August 3, 1990, is reproduced at A-16.

The Opinion of the Sixth Circuit in *Hill v. Marshall*, Case No. 86-3987, November 4, 1988, reversing and remanding on appeal from the first jury verdict in favor of Defendants, is reproduced at A-23.

The Order of the Sixth Circuit denying Defendant's Petition for Rehearing filed July 23, 1992 is reproduced at A-28.

JURISDICTIONAL STATEMENT

The opinion of the United States Court of Appeals for the Sixth Circuit was entered May 1, 1992 (A-1). A timely petition for rehearing was denied July 23, 1992, (A-28) and this petition is timely filed. Sup. Ct. R. 13. Jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

This case involves the following constitutional provision:

U.S. Const. amend. VIII [1791]

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT OF THE CASE

From May through July of 1981, inmate Lawrence Hill ("Hill") was a resident in the Hamilton County Jail in Cincinnati, Ohio, awaiting commitment to the Ohio Department of Rehabilitation and Correction. Upon entering the Hamilton County Jail in May 1981, he reported to the intake medical personnel that in 1976 he had tested negative to a tuberculin skin test.[1] Later in May 1981, he became ill and was examined by the attending physician. The provisional diagnosis was pneumonia or tuberculosis. Since tuberculosis was suspected, Mr. Hill was given a tuberculin skin test. Mr. Hill tested positive which meant that he was infected with the tuberculosis bacteria.[2] Chest x-rays and sputum examinations disclosed that he had not developed tuberculosis. To treat the infection, the attending physician prescribed isoniazid ("INH") at 300 milligrams per day for one year, and Vitamin B-6 at one tablet a day for one year. The INH was prescribed to reduce Mr. Hill's risk of developing tuberculosis. Mr. Hill received his medication while at the Hamilton County Jail.

At the end of July, he was transferred to the Columbus Correctional Facility ("CCF"). After examination, a CCF doctor also prescribed INH 300 milligrams and Vitamin B-6 every day for one year. Repeated chest x-rays and sputum examinations again disclosed that he had not developed tuberculosis. Mr. Hill received his medication while at CCF.

On October 1, 1981, Mr. Hill was transferred to the Southern Ohio Correctional Facility ("SOCF"), a maximum security facility. Upon arrival, his INH medication was taken from him for security reasons. A new prescription was issued

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[1] A pure-protein-derivative ("PPD") tuberculin skin test is used to identify persons infected with the tuberculosis bacteria. The infection alone does not mean that the infected person will actually develop tuberculosis in the future.

[2] This is called a positive PPD conversion, meaning that Mr. Hill first had a negative test and later had a positive test.

continuing his INH and Vitamin B-6 medication. Repeated chest x-rays and sputum examinations again disclosed that he had not developed tuberculosis. Mr. Hill claims that from October 1, 1981 to July 28, 1982, his requests for medication were ignored and thus he was deprived of his INH at SOCF.

On December 20, 1982, Mr. Hill filed a 42 U.S.C. § 1983 action in the United States District Court for the Southern District of Ohio, Western Division. Mr. Hill alleges that Terry Morris ("Morris"), Superintendent of Treatment at SOCF, along with others who are no longer parties, deliberately failed to provide him with his INH medication for the prescribed period October 1, 1981 to July 28, 1982.

On July 2, 1986, the first of two jury trials commenced. After approximately five days of trial, the jury returned a general verdict in favor of all the defendants.

On August 8, 1986, Plaintiff appealed to the Sixth Circuit. On November 4, 1988, the Sixth Circuit reversed and remanded the case. (A-28).

At the second trial in 1990, Mr. Hill's medical expert, Dr. William Krall, testified that Mr. Hill had a tuberculosis infection but had not developed tuberculosis; that the infection itself is an asymptomatic condition, not causing pain or suffering; that Mr. Hill could have developed his infection at any point in time between his negative tuberculin skin test in 1976 and positive test in May 1981; and that INH may reduce a person's risk of developing tuberculosis by up to ninety percent. Dr. Krall further testified that, as a result of his infection, Mr. Hill's risk of developing tuberculosis, according to epidemiological data, ranged from twenty-three percent to five percent during the first five years following his infection; then, beyond those first five years, his risk ranged from less than five percent to one-tenth of one percent; that tuberculosis is a communicable disease; that it is transmitted through the air from one person to another; and that it is a treatable and curable disease.

Although Mr. Hill had no existing injury or disease, the

jury awarded him $95,000 in compensatory damages and $900,000 in punitive damages based on the mere possibility (ranging from five percent to a fraction of one percent) that he would develop tuberculosis in the future.

On May 10, 1990, Mr. Morris submitted a Motion for Judgment Notwithstanding the Verdict or, in the alternative, a Motion for a New Trial and a Motion for Remittitur of damages assessed or a New Trial.

On August 3, 1990, the District Court entered an Order denying Mr. Morris's Motion for Judgment Notwithstanding the Verdict and New Trial but granting Mr. Morris's Motion for Remittitur or New Trial. (A-16). The District Court found that the punitive damages award was the result of prejudicial evidence. Plaintiff accepted the remittitur rather than face a new trial.

On Mr. Morris's appeal, the Sixth Circuit reaffirmed its recognition that an actual injury is an essential element of a medical deprivation claim. The Sixth Circuit, however, went on to erroneously focus on the reduction of the potential risk, which is the goal for administering INH, instead of focusing on Mr. Hill's risk of developing tuberculosis. The lower court stated:

> This court has held that a plaintiff with an Eighth Amendment claim may recover for any injury caused by a denial of medical care and any concomitant pain, suffering, or mental anguish. *Parrish v. Johnson*, 800 F.2d 600, 611 (6th Cir. 1986). Hill has suffered an actual injury, in that he was prevented, by Morris's indifference to his medical needs, from reducing his risk of developing tuberculosis by approximately ninety percent through INH. . . .

Hill v. Marshall, 962 F.2d 1209, 1215 (6th Cir. 1992); (A-1).

The Sixth Circuit erroneously concluded that Mr. Hill could

establish his potential future harm (tuberculosis) based on mere possibilities instead of probabilities.

> Contrary to Morris's contention, Hill did not have to show a more than 50% risk of developing tuberculosis, only that his risk had increased due to the deprivation.

Id. at 1214; (A-1).

Further, the Sixth Circuit reversed and remanded the District Court's grant of remittitur. The Sixth Circuit characterized the remittitur of $900,000 of the $995,000 damages award as a judgment notwithstanding the verdict. As a consequence, Mr. Morris was deprived of the awarded remittitur or in the alternative a new trial. (A-16.) The Sixth Circuit then remanded for the assessment of some punitive damages.

On July 23, 1992, the Court of Appeals denied both the Petition for Rehearing and Suggestion for Rehearing En Banc. (A-28.)

ARGUMENT IN SUPPORT OF GRANTING CERTIORARI

This Court should grant the writ of certiorari because the Sixth Circuit's opinion has, in effect, determined extremely important issues of constitutional law that have not been, but should be decided by this Court.

The most significant facts in this case are that although Mr. Hill had no existing injury or disease, the jury awarded him almost one million dollars based on the mere possibility (ranging from five percent to a fraction of one percent) that he would develop tuberculosis in the future, and that the Sixth Circuit permitted this senseless and outrageous verdict to stand.[3]

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[3] The State of Ohio is precluded from reimbursing Morris for the punitive damage component ($900,000) of the award.

This Court has never squarely decided whether the mere possibility of developing a future injury or disease caused by an alleged denial of medical attention is a cognizable harm for the purpose of establishing an Eighth Amendment deprivation of medical care violation.[4] This Court must decide this very important constitutional issue now. The reasons are that, if permitted to stand, the Sixth Circuit's opinion will open the floodgates to speculative and fraudulent claims, will overburden the judiciary leading to a greater drain on limited judicial resources, will eventually lead to a depletion of states' treasuries, and will unjustifiably expand Eighth Amendment protection to interests already protected by state tort law.

I. HARM (INJURY OR DISEASE) IS AN ESSENTIAL ELEMENT OF A PRISONER'S EIGHTH AMENDMENT DEPRIVATION OF MEDICAL CARE CLAIM.

Prisoners' deprivation of medical care claims stem from this Court's decision in *Estelle v. Gamble*, 429 U.S. 97 (1976) in which the Court stated:

> In order to state a cognizable claim, a prisoner must allege acts or omissions *sufficiently harmful* to evidence deliberate indifference to serious medical needs. It is only such indifference that can offend "evolving standards of decency" in violation of the Eighth Amendment.

Id. at 106. (emphasis added).

In *Wilson v. Seiter*, 111 S. Ct. 2321 (1991), this Court ruled that when a prisoner is claiming his conditions of confinement constitute cruel and unusual punishment, he

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[4] Whether resulting harm has to be established in terms of possibilities or probabilities is an issue before this Court in *McKinney v. Anderson*, 959 F.2d 858 (9th Cir.), *cert. granted sub nom. Helling v. McKinney*, 112 S. Ct. 3024 (1992) (environmental tobacco smoke).

must prove (1) an objective element, that the deprivation was sufficiently harmful; and (2) a subjective element, that the officials acted with a sufficiently culpable state of mind in order to establish an Eighth Amendment violation. *Id.* at 2323-2326.

In *Hudson v. McMillan*, 112 S. Ct. 995 (1992), this Court, in the context of a use of force claim, observed:

> . . . [E]xtreme deprivations are required to make out a condition-of-confinement claim . . . Only those deprivations denying the 'minimal civilized measures of life's necessities' are sufficiently grave to form the basis of an Eighth Amendment violation.
>
> . . . A similar analysis applies to medical needs. Because society does not expect that prisoners will have unqualified access to health care, deliberate indifference to medical needs amounts to an Eighth Amendment violation only if those needs are "serious".

Id. at 1000.

The significant point made in *Hudson* is that the concept "sufficiently harmful deprivation" in condition cases and the concept "serious medical needs" in medical care cases both serve as the rigorous standards a prisoner must meet to establish an Eighth Amendment violation. The notion of harm is obviously encompassed within the concept "sufficiently harmful deprivation." However, it is not readily apparent that the notion of harm is also encompassed within the concept "serious medical needs."

Although courts have struggled to formulate a meaningful definition of "serious medical needs", the concept remains elusive. *Ramos v. Lamm*, 639 F.2d 559, 575 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981); *Laaman v. Helgemore*, 437 F. Supp. 269, 311 (D. N.H. 1977). Understanding is enhanced if there is a recognition that "serious medical needs" and "serious medical consequences" are

interdependent concepts. An assessment of the "seriousness" of the medical consequences caused by the lack of attention to a medical need is a critical factor in determining the "seriousness" of the medical need. Conversely, lack of attention to "serious medical needs" generally results in "serious medical consequences". *See Clemmons v. Bohannon*, 956 F.2d 1523 (10th Cir. 1992) *(reh'g en banc); Gaudreault v. Salem*, 923 F.2d 203, 208 (1st Cir. 1990), *cert. denied*, 111 S. Ct. 2266 (1991); *Monmouth County Correctional Institutional Inmates v. Lanzaro*, 834 F.2d 326, 347 (3d Cir. 1987), *cert. denied*, 486 U.S. 1006 (1988). As a result of the interdependency of the two concepts, the notion of harm is implicitly woven into the concept of "serious medical needs." Understanding of this point is further enhanced if there is a recognition that pain, the unnecessary and wanton infliction of which is banned by the Eighth Amendment, is a form of harm. Pain, therefore, is a medical "consequence of [an] injury, disease or emotional disorder". *Webster's II New Riverside University Dictionary*, 845 (1988).

In *Hudson*, Justices Thomas and Scalia made it perfectly clear that resulting injury is an essential element of a prisoner's Eighth Amendment deprivation of medical care claim:

> We made clear in *Estelle* that the Eighth Amendment plays a very limited role in regulating prison administration. The case involved a claim that prison doctors had inadequately attended an inmate's medical needs. We rejected the claim because the inmate failed to allege "acts or omissions sufficiently harmful to evidence *deliberate indifference* to *serious* medical needs." *Id.*, at 106, 97 S. Ct., at 292 (emphasis added). From the outset, thus, we specified that the Eighth Amendment does not apply to every deprivation, or even every unnecessary deprivation, suffered by a prisoner, but *only* that narrow class of deprivations involving "serious" injury inflicted by prison officials acting with a culpable state of mind. We have since described these twin elements as

> the "objective" and "subjective" components of an Eighth Amendment prison claim. See *Wilson v. Seiter*, 111 S. Ct. 2321, 2324, 115 L.Ed.2d 271 (1991).

Hudson, 112 S. Ct. at 1006 (Thomas, J dissenting)

In *Wood v. Housewright*, 900 F.2d 1332 (9th Cir. 1990), the Ninth Circuit arrived at the same conclusion. The Ninth Circuit stated:

> Nor does the delay in treatment that Wood suffered constitute an Eighth Amendment violation. (citation omitted.) Given the seriousness of his condition and the treatment Wood actually received such harm was not present here.

Id. at 1335.

We submit that resulting harm (injury or disease) is an essential element of a prisoner's deprivation of medical care claim. No such harm has been established in this case.

II. THE MERE POSSIBILITY OF DEVELOPING A FUTURE INJURY OR DISEASE CAUSED BY A DENIAL OF MEDICAL ATTENTION IS NOT A COGNIZABLE HARM FOR THE PURPOSE OF ESTABLISHING AN EIGHTH AMENDMENT DEPRIVATION OF MEDICAL CARE VIOLATION.

In *Estelle v. Gamble*, 429 U.S. 97 (1976), plaintiff had an existing injury. In this case, Mr. Hill does not have an existing injury or disease. Instead, Mr. Hill is infected with the tuberculosis bacteria. His infection was not caused by Mr. Morris's alleged offending conduct. His infection is asymptomatic; thus, it has not caused pain or suffering.

Daily administration of INH for one year is administered to reduce the potential risk of developing tuberculosis. Unlike an *Estelle*-type case, the medical need for administering INH is not based on the need to treat an existing injury or disease. Likewise, the medical need for doing so is not based on

the person's individualized risk of developing tuberculosis as a result of his infection. The risk varies from person to person. Instead, the medical need for administering INH is based on statistical studies of groups of persons with significant tuberculin skin test reactions. Such studies show that some groups are at greater risk than others for developing tuberculosis. INH is recommended for persons in those greater risk groups.[5]

In this case, according to epidemiological data relied upon by Dr. Krall, Mr. Hill's risk of developing tuberculosis as a result of his infection ranged from an initial high of twenty-three percent to a low of five percent. Specifically, at the time of his trial in 1990, his risk of developing tuberculosis ranged from less than five percent to as low as one tenth of one percent. If he did, in fact, receive his INH, his risk would be reduced, at best, by ninety percent, that is, to one-tenth of what his risk actually was. If Mr. Hill did not, in fact, receive his INH, his risk would remain exactly the same, somewhere between twenty-three percent and less than one percent.

Because Mr. Hill's diminishing risk has not been altered by Mr. Morris's alleged offending conduct, Mr. Hill has not sustained an existing injury.[6] Mr. Hill's potential risk of harm

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[5] "Every person who has a significant tuberculin skin test reaction is at some risk of developing tuberculosis and presumably can benefit from isoniazid preventive therapy; however, not all reactors are at equal risk. Persons can be categorized to a certain extent into groups having different likelihoods of developing tuberculosis; various host factors will influence the probability." Joint statement of the American Thoracic Society and the Center for Disease Control contained in the article entitled *Treatment of Tuberculosis and Tuberculosis Infection*, 134 Am. Rev. Respir. Dis. 355, 360 (1986).

[6] The Sixth Circuit completely missed the mark by focusing on the reduction in potential risk, which is the goal for administering INH, instead of focusing on the *actual risk factor*. This is why it erroneously concluded that: "Hill has suffered an actual injury, in that he was prevented by Mr. Morris's indifference to his medical needs from reducing his risk of developing tuberculosis by ninety percent." *Hill v. Marshall*, 962 F.2d at 1215; (A-1).

here is the mere possibility that he will develop a future disease. But the mere possibility of developing a future disease is not a cognizable harm for the purpose of establishing an Eighth Amendment violation, *Clemmons v. Bohannon*, 956 F.2d 1523, 1527 (10th Cir. 1992) (*reh'g en banc*) because the predicted outcome (manifestation of disease) is speculative and conjectural.[7] *See Reichenberger v. Pritchard*, 660 F.2d 280, 285 (7th Cir. 1981). Since Mr. Hill has failed to show a cognizable harm, he has failed to establish an Eighth Amendment deprivation of medical care violation.

This approach to resolving the foregoing problem does not offend current standards of decency in our society for it is consistent with that taken by the states in traditional tort cases in which plaintiffs are seeking damages for an increased risk of developing a future injury or disease. Recovery is denied for speculative and conjectural future harm claims. In order to recover, plaintiffs generally must establish in terms of reasonable probabilities that the predicted future disease will occur. The terminology commonly utilized is that the probability of developing the future disease is "medically reasonably certain," or "more than 50% certain" to occur.[8] *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1204 (6th Cir. 1987) (interpreting Tennessee law); *Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394, 412 (5th Cir.), *cert. denied*, 478 U.S. 1022 (1986) (interpreting Mississippi law). The reason for quantifying the risk in such cases is that society sees a need to protect the public from

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[7] "Clemmons claims his exposure to ETS [environmental tobacco smoke] may lead to more serious carcinogenic effects. . . . However, Clemmons does not offer any evidence that shows effects pertaining to his personal health besides a sore throat and runny eyes and nose. . . . The Eighth Amendment does not sweep so broadly as to include latent harms to health." *Clemmons v. Bohannon*, 956 F.2d at 1527.

[8] The Sixth Circuit erroneously concluded that "Hill did not have to show more than a 50% risk of developing tuberculosis, only that his risk has increased due to the deprivation." *Hill v. Marshall*, 962 F.2d at 1214; (A-1).

legal principles which could open the floodgates to speculative and fraudulent claims and which could eventually deplete the states' treasuries. *Ayers v. Township of Jackson*, 106 N.J. 557, 525 A.2d 287 (1987); *Jackson v. Johns-Manville Sales Corp.*, 781 F.2d at 413. For the same reasons, this Court must quantify the risk in future harm cases.

Petitioner submits that a writ of certiorari should therefore be issued to review the decision of tne United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LAWRENCE HILL,
Plaintiff-Appellant (90-3923),
Cross-Appellant (90-3826),

v.

RONALD C. MARSHALL,
Defendant,

On Appeal from the United States District Court for the Southern District of Ohio

TERRY MORRIS,
Defendant-Appellant (90-3803)
Cross-Appellee.

Decided and Filed May 1, 1992

Before: MARTIN AND JONES, Circuit Judges; and BROWN, Senior Circuit Judge.

NATHANIEL R. JONES, Circuit Judge. Plaintiff Lawrence Hill, an Ohio inmate, appeals the district court's order of remittitur of his entire punitive damages award, in a civil rights action under 42 U.S.C. § 1983 (1988). Hill charges the defendant, Terry Morris, the Deputy Superintendent of Treatment at the institution in which Hill is imprisoned, with cruel and unusual punishment violative of the Eight Amendment, by way of improper inmate medical care. Defendant cross-appeals, challenging, on several grounds, the judgment on the jury verdict for plaintiff. For the reasons that follow, we reverse the district court's "remittitur" and affirm in all other respects.

I.

The facts of this case are hotly disputed. Both parties agree that, in May of 1981, Hill experienced an illness that included some symptoms of tuberculosis, and that these symptoms prompted those individuals in charge of his health at the Hamilton County Jail in Cincinnati, Ohio to administer a pure-

protein-derivative ("PPD") tuberculin skin test. The results of this test were positive. The positive result did not signify, however, that Hill had active tuberculosis, the disease itself, but rather that the tuberculin bacteria were in his body and that without prevention they could become active. The preventative medicine prescribed to Hill was Isoniazid ("INH"), at 300 milligrams per day, and Vitamin B-6, at one tablet a day, for one year. Hill's expert testified that a patient could be worse off, however, if the INH is taken erratically rather than regularly, because the bacteria could build up an immunity to the drug that would make active tuberculosis harder to treat, if the disease did in fact develop.

Hill began taking his medication in July of 1981. At the end of that month, he was transferred from the Hamilton County Jail to the Columbus Correctional Facility, where he was reexamined and again prescribed 300 milligrams of INH to be taken daily until July 28, 1982.

Two months later, on October 1, 1981, he was again transferred, this time to the Southern Ohio Correctional Facility ("SOCF"), where Morris, the defendant, was the Deputy Superintendent of Treatment. Upon his arrival, Hill's medication was confiscated, a matter of routine procedure of SOCF. He was issued a new prescription, continuing the old one, by Nurse Imogene Ferguson. This prescription was entered in to the proper records, according to Morris.

At this point, the claims of Hill and Morris diverge widely. Hill alleges that he was told that he would receive his medication at SOCF by standing in the "pill line,"[1] but that he took this action day after day and never received his prescription. Even after complaining and sending "kites" — informal written complaints — to the infirmary administrator and to Morris, his problem was ignored and he continued to be deprived of his medication. The situation finally provoked him to file this lawsuit.

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[1] The term "pill line" refers to the line at the station where inmates' medication is handed out three times a day.

Morris, on the other hand, claims that all of Hill's records were properly filed and current, and that they contained no notations of withholding or stopping Hill's prescription. Morris claims that, if the proper records existed, there would be no reason that Hill would not receive his medication.

Indeed, one of the nurses who works the pill line testified that she had never seen Hill before the deposition for this trial, which might suggest that, whether there was medication available for Hill or not, he never came to claim it. On the other hand, the implications of that testimony are diminished in that there are no notations in the SOCF records that Hill was a "no-show" — that there was medication prepared for Hill at the station that he never picked up. Moreover, other nurses at that station testified that Hill had prescriptions besides the one for INH that he should have picked up at the pill line, and there were no no-shows noted for those medications either.

The only reference in Hill's file concerning INH was a notation that Hill made an inquiry on December 8, 1981 to a Nurse Jackie Buffington, which she immediately investigated. She testified that her investigation revealed that the INH was at the pill line for Hill, at which point Hill told her he did not know how to get his medication from the pill line.

Hill also offered circumstantial evidence in support of his claim. This evidence tended to show that the facility's health care system was poorly run in general. A report was compiled and written by Shirley Pope, Senior Research Associate for the Correctional Institution Inspection Committee ("Committee"). The Committee was established by the Ohio legislature for the express purpose of making such reports. Her research showed that many inmates complained about not receiving medicaments, such that SOCF had a pervasive pattern of failing to provide proper medication for inmates. Furthermore, Morris himself testified that the pill line was closed sometimes when it should have been open, that prescriptions were not always filled or received by inmates, and that prescriptions were sometimes altered or destroyed

by the head nurse without a doctor's approval. Morris further testified that he knew of all of these circumstances and for months — during the very period in which Hill was allegedly not receiving his medication — he did little or nothing about it.

Hill filed this pro se § 1983 action on December 20, 1982 against the following parties: Ronald Marshall, then Superintendent of SOCF; Morris, then Deputy Superintendent of Treatment; Jerry Wente, then SOCF Infirmary Administrator; and James Rhodes, then Governor of Ohio. Hill claimed that SOCF, by denying him his medication, had subjected him to cruel and unusual punishment in violation of his Eighth Amendment rights. The case went to trial in July of 1986, with Hill represented by a court-appointed attorney. The court dismissed Rhodes and Marshall; subsequently, the jury returned a general verdict in favor of the remaining two defendants, including Morris. Hill moved for judgment notwithstanding the verdict or, alternatively, for a new trial. This motion was denied, so he appealed to this court.

In November 1988, this court reversed the district court's decision denying Hill's motion. The court remanded for a new trial, holding that the district court had erred in categorically excluding from evidence the circumstantial evidence contained in the Committee report, which plaintiff needed to prove a pervasive pattern of wrongdoing. Upon remand, the case went to trial in March 1990. Defendants Morris and Wente twice moved for a directed verdict; however, the court submitted the case to the jury on special interrogatories. The jury found that Morris had been deliberately indifferent to Hill's medical needs. On this ground, the jury returned a unanimous verdict finding Morris liable to Hill for $95,000 in compensatory damages and $900,000 in punitive damages.

Morris moved for judgment notwithstanding the verdict or for a new trial, and for remittitur of damages. The district court conditionally granted Morris's motion for new trial, unless Hill would agree to take a remittitur of the entire

amount of the punitive damages award. He reluctantly agreed, reserving the right to appeal. Defendant Morris appealed his liability and the denial of his motion for judgment notwithstanding the verdict on various claims of error in August 1990. In September 1990, Hill appealed the remittitur. These appeals were consolidated before this Court.

Hill's appeal raises only the issue of whether the district court erred in granting the remittitur. Morris raises five issues on appeal: (1) whether he can properly be held liable in his supervisory capacity, (2) whether the district court erred in failing to grant Morris's motion for judgment notwithstanding the verdict or for a new trial, (3) whether the district court abused its discretion in admitting certain prejudicial material into evidence, (4) whether Hill's counsel's conduct prejudiced the jury such that Morris did not receive a fair and impartial trial, and (5) whether the compensatory damages award is supported by the weight of the evidence. We address the issues raised by Morris seriatim and, lastly, Hill's remittitur issue.

II.

Morris first asks this Court to hold that he cannot be held liable in his supervisory capacity. We decline to so hold.

Morris argues that, because *respondeat superior* does not provide a basis for imposing liability upon a municipality in a § 1983 action, *see Monell v. Dep't of Social Serv.*, 436 U.S. 658, 693-95 (1978), he cannot be held liable in the instant case, as Hill did not plead and prove Morris's direct personal involvement. According to Morris, *Rizzo v. Goode*, 423 U.S. 362 (1976), establishes that the mere failure to act, even in the face of a statistical pattern of misconduct, is an insufficient basis for holding a supervisor liable for the constitutional violations of her employees. *Id.* at 375-76.

Hill does, however, allege that the defendant personally ignored his complaint. Moreover, the evidence supports this allegation. Morris, by his own admission, had referred inmates' complaints of not getting medication to the head nurse, the very person whom he knew to be wrongly altering and destroying some of the inmates' prescriptions. J.A. at 605-06, 632-39. Thus *Goode* is distinguishable from the instant case. In *Goode*, the defendants were charged with "fail[ing] to act in the face of a statistical pattern" of governmental employee misconduct. *Id.* Here, by contrast, Morris is charged with abandoning the specific duties of his position — reviewing and responding to inmates' complaints about medical needs — in the face of actual knowledge of a breakdown in the proper workings of the department. Hill does not seek to hold Morris vicariously liable for the head nurse's misconduct. Rather, Morris *personally* had a job to do, and he did not do it. His failure to do his job resulted directly in a violation of the plaintiff's Eighth Amendment right.

Morris also urges this Court to find that *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989), precludes Hill's damages claims against him. He relies on this circuit's opinion in *Rice v. Ohio Department of Transportation*, 887 F.2d 716 (6th Cir. 1989), in which we held that "[t]he capacity in which the individual defendants were in fact acting is what matters, not the capacity in which they were sued." *Id.* at 719. *Rice* is no longer good law, however, because the Supreme Court vacated the opinion. *Rice v. Ohio Dep't of Transp.*, 110 S. Ct. 3232 (1990). Moreover, the Supreme Court has since decided *Hafer v. Melo*, 112 S. Ct. 358 (1991), in which the court clarified its decision in *Will*, *Hafer* holds that "the phrase 'acting in their official capacities' is best understood as a reference to the capacity in which the state officer is sued, not the capacity in which the officer inflicts the alleged injury." *Id.* at 362 (quoting *Will*, 491 U.S. at 71). There can be no further doubt that Hill's action for damages against Morris in his personal capacity, *for actions taken in the course of his office*, is proper; Morris can be held liable for damages for those actions.

III.

Morris next raises the question whether the district court erred in failing to grant his motion for judgment notwithstanding the verdict or for a new trial. The standard of review of a motion for judgment notwithstanding the verdict is whether there is sufficient evidence to raise a question of fact for the jury. *Morelock v. NCR Corp.*, 586 F.2d 1096, 1104 (6th Cir. 1978), *cert. denied*, 441 U.S. 906 (1979). The appellate court considers this question de novo. *Id.* at 1104-05. Morris contends that a reasonable jury could not conclude that he was deliberately indifferent to Hill's medical needs. Morris argues that an allegation that he failed to respond to *one* complaint cannot be the basis for a finding of a premeditated lack of concern.

We disagree with Morris's characterization of this issue. The jury's finding is not supported solely by the fact that Hill's kite went unanswered. Also of great significance in this case is the fact that Hill was able to offer strong proof of a pervasive pattern of indifference to the inmates' medical needs generally.

In *Estelle v. Gamble*, 429 U.S. 97 (1976), the Supreme Court established the deliberate indifference standard:

> [D]eliberate indifference to serious medical needs of prisoners constitutes the "unnecessary and wanton infliction of pain" proscribed by the Eighth Amendment. This is true whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed.

Id. at 104 (citation omitted)(footnotes omitted). In *City of Canton v. Harris*, 489 U.S. 378 (1989), the Court applied the deliberate indifference standard to the failure of a city adequately to train its police officers to deal with the medical needs of those being held in custody. The Court held that

where "the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, . . . the policymakers of the city can be reasonably said to have been deliberately indifferent to the need." *Id.* at 390; *see Berry v. City of Muskogee*, 900 F.2d 1489, 1496 (10th Cir. 1990)(holding that "an official or municipality acts with deliberate indifference if its conduct (or adopted policy) disregards a known or obvious risk that is very likely to result in the violation of a prisoner's constitutional rights"). Although the *Canton* and *Berry* cases differ from the case at bar in that they concern municipalities and policies of indifference, we find them useful in determining the perimeters of "deliberate indifference." In this case, Morris's failure to do his job — to review and respond to inmates' medical needs — was so likely to result in the violation of the inmates' constitutional rights that we find that he was deliberately indifferent to their serious medical needs. Accordingly, the district court committed no error in denying Morris's motion for judgment notwithstanding the verdict.

IV.

The third issue that Morris raises is whether the district court abused its discretion in admitting certain evidence, on the grounds that, under Federal Rule of Evidence 403, the evidence should have been excluded as prejudicial. In particular, Morris claims that references to Hill's increased risk of developing active tuberculosis, testimony relating to the actions of Nurse Ferguson, the complaints of other inmates, and Pope's testimony and report were misleading and prejudicial.

We review the district court's admission of such material under an abuse of discretion standard. *Zamlen v. City of Cleveland*, 906 F.2d 209, 215 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 1388 (1991). Even if the lower court abused its discretion, its ruling will not be disturbed on appeal if it did not result in a substantial injustice. *Id.* at 216. There was no such injustice here. Rule 403 states that relevant evidence "may be excluded if its probative value is substantially

outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403. None of the evidence to which Morris objects was *substantially* outweighed by the danger of unfair prejudice or confusion. Contrary to Morris's contention, Hill did not have to show a more than 50% risk of developing active tuberculosis, only that his risk had increased due to the deprivation. *See Westlake v. Lucas*, 537 F.2d 857, 860 n.4 (6th Cir. 1976)(holding that the trier of fact should consider, inter alia, "the possible consequences to the prisoner of failing to provide [the needed] medical attention"); *Clark v. Taylor*, 710 F.2d 4, 14 (1st Cir. 1983)(where plaintiff's increased risk of developing bladder cancer — up from one in ten thousand to one in ten — was compensable). Evidence relating to Ferguson's misconduct was clearly quite relevant to Hill's claim, and was in no way outweighed by any slight possibility of confusion claimed by Morris. Pope's report, which was authorized by the Ohio legislature, was both informed and informative, and was properly admitted expert testimony.[2] If anything, the district court may have erred in allowing some overly repetitious presentation of evidence, but to the extent that this is true, we believe it did not result in a substantial injustice.

V.

Morris alleges next that the conduct of Hill's counsel was such that the jury was unfairly prejudiced, necessitating a new trial. Hill's counsel repeatedly referred to active tuberculosis, for which the district court judge admonished him. Counsel also pursued a line of questioning with two witnesses after being told by the district court that the questions were improper. Morris argues that, despite the fact that " '[t]he trial court is in a far better position to measure

[2] Morris also alleges that Pope's report is inadmissible as hearsay. This claim is without merit; the report is admissible under Federal Rule of Evidence 803(8), the exception for public records and reports.

the effect of an improper question on the jury than an appellate court which reviews only the cold record,' " *City of Cleveland v. Peter Kiewit Sons' Co.*, 624 F.2d 749, 756 (6th Cir. 1980) (quoting *Harris v. Zurich Ins. Co.*, 527 F.2d 528, 531 (8th Cir. 1975)), where misconduct is pervasive and has improperly influenced the jury, it is the Court's duty to set the verdict aside.

The district court has discretion as to what statements and arguments counsel may make at trial. *Id.* Having surveyed the five volume record, we cannot say that the district court abused its discretion. The district court seemed at times to have had some problems in getting its message across to Hill's attorney; however, nothing was said that was so improper or inflammatory as to warrant our granting a new trial.

VI.

Finally, Morris alleges that the evidence does not support the award of $95,000 in compensatory damages. He argues that Hill had no compensable loss. Morris also insists that Hill should have "mitigated his damages" by seeking help from a psychiatrist for the mental anguish Hill claims he had and has. Moreover, Morris cites two cases — one a wrongful death and one an amputation — in which the jury awards were $50,000 and $30,000 respectively, as indicating that this award was excessive. *See Jones v. Wittenberg Univ.*, 534 F.2d 1203, 1213 (6th Cir. 1976); *Scharfenberger v. Wingo*, 542 F.2d 328 (6th Cir. 1976).

This court has held that a plaintiff with an Eighth Amendment claim may recover for any injury caused by a denial of medical care and any concomitant pain, suffering, or mental anguish. *Parrish v. Johnson*, 800 F.2d 600, 611 (6th Cir. 1986). Hill has suffered an actual injury, in that he was prevented, by Morris's indifference to his medical needs, from reducing his risk of developing tuberculosis by approximately ninety percent through INH. Because he received INH for part, but not all, of the prescribed year, Hill may be in an even worse position than if he had not

received INH at all, according to Hill's expert, because the tuberculosis bacteria that are in his system may have become resistant to the drug. Hill testified that he suffered a great deal of mental anguish on this account, and his testimony was supported by testimony of a fellow inmate, Johnny Flournoy. As Morris points out, a jury verdict will not be set aside or reduced as excessive unless it is beyond the maximum damages that the jury reasonably could find to be compensatory for a party's loss. *Green v. Francis*, 705 F.2d 846, 850 (6h Cir. 1983). We do not find that such was the case in this action. There was sufficient evidence to support the jury's finding that Hill suffered $95,000 in damages; the district court's decision to allow the award to stand will not be disturbed.

VII.

Hill, for his part, asks us to hold that the district court's decision to grant Morris a remittitur of the entire amount of the punitive damages award was error. His claim asks the Court to take two steps. First, he argues that the "remittitur" in this case was actually a judgment notwithstanding the verdict as to punitive damages and that we must therefore review it as such, as we did in the unpublished case of *Coffman v. Briggs*, No. 79-1512 (6th Cir. March 9, 1981) (Westlaw, CTA6 database). Second, he argues that, under the standard of review for a judgment notwithstanding the verdict, the district court erred in holding that there was no evidence that would support an award of punitive damages.

We believe that Hill is correct in arguing that whenever a court sets aside the entire punitive damages award, rather than merely the excessive portion, it has not granted a remittitur, but rather a judgment notwithstanding the verdict. This court indicated as much in *Coffman*. There the jury awarded both of the plaintiffs $20,000 each in punitive damages, in addition to compensatory damages. *Id.*, slip op. at 1. The defendants moved for a new trial or for a remittitur. The district court entered judgment upon the verdict as to liability and the compensatory damages awards, "but it 'set

aside' the verdicts and judgments with respect to punitive damages on the ground that there was 'not any evidence' to support such award of punitive damages." *Id.* The *Coffman* court held that "the district judge [, in taking this action, was] in effect granting a judgment n.o.v. with respect to punitive damages." *Id.* The plaintiffs appealed the decision to "set aside" the award as a decision to grant judgment notwithstanding the verdict. Although this Court is not bound by Coffman, we agree with its conclusion.

A remittitur is defined as "[t]he procedural process by which an excessive verdict of the jury is reduced." *Black's Law Dictionary*, 1295 (6th ed. 1990). We are persuaded by the logic implied in *Coffman*, that to eliminate or "set aside" an entire damages award — on the grounds "that there is insufficient evidence to support an award of punitive damages," J.A. at 167 — is not to "diminish" an award, but to do something much more. This court has noted that "a jury's award will not be reduced as excessive unless it is beyond the maximum that the jury could reasonably find to be compensatory for a party's loss." *Jones v. Wittenberg Univ.*, 534 F.2d 1203, 1212 (6th Cir. 1976). The Supreme Court has stated that "remittitur has the effect of merely lopping off an excrescence." *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935). The Second Circuit has noted that what is crucial to the practice of granting remittitur is "the requirement that the court confine its role *to the removal of the excess portion of the verdict so that the 'damage calculation leaves in the judgment a portion of which the jury awarded.' "* *Shu-Tao Lin v. McDonnell Douglas Corp.*, 742 F.2d 45, 49 (2d Cir. 1984)(emphasis added)(quoting *Akermanis v. Sea-Land Serv.*, 688 F.2d 898, 902 (2d Cir. 1982), *cert. denied*, 461 U.S. 927 (1983)).

The district court based its conditional grant of a new trial on Hill's acceptance of a "remittitur" of the whole punitive damages award. Before we can address whether the action it took was error, we wish to establish that it has given that action the wrong label. "If the court believed that the jury's verdict was unsupported by the evidence, it could have granted judgment notwithstanding the verdict to defendant.

If it believed that the verdict was supportable, but that the jury's award of damages was grossly excessive, it could have fixed a remittitur amount." *De Jesus v. Banco Popular de Puerto Rico*, 918 F.2d 232, 235 (1st Cir. 1990). Hill contends that the district court took the former course. Morris's only response to this contention is to point to Supreme Court and circuit precedent for the proposition that a plaintiff accepting a remittitur, even "under protest," may not challenge the remittitur on appeal, *Donovan v. Penn Shipping Co.*, 429 U.S. 648, 649 (1977)(per curiam); *see Smith v. John Swafford Furniture Co.*, 614 F.2d 552, 553 n.1 (6th Cir. 1980), or on cross-appeal, *Woodworth v. Chesbrough*, 244 U.S. 79, 82 (1917). Although Morris may well be correct, the cases he cites are simply not applicable to the instant case, because we conclude that the district court's action constituted a judgment notwithstanding the verdict, not a remittitur, and as Hill urges, we will review it as such.

Under the standard of review for a judgment notwithstanding the verdict, again, the appellate court considers de novo whether there is sufficient evidence to raise a question of fact for the jury. *Morelock v. NCR Corp.*, 586 F.2d 1096, 1104-05 (6th Cir. 1978), *cert. denied*, 441 U.S. 906 (1979). If, when viewing all evidence most favorably to the opposing party, no reasonable minds could find against the moving party, judgment notwithstanding the verdict is proper. *Id.*

After reviewing the record and hearing oral argument, we conclude that there was sufficient evidence to present a question of fact for the jury on the issue of punitive damages. Indeed, the district court has already determined, by approving the verdict awarding compensatory damages, that there was sufficient evidence to support a finding by the jury of "deliberate indifference" on the part of Morris. The Supreme Court has stated that punitive damages are appropriate under 42 U.S.C. § 1983 "when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." *Smith v. Wade*, 461 U.S. 30, 56 (1983). This circuit has phrased the standard for

defendant's conduct to warrant punitive damages as grossly negligent, intentional, or malicious. *Lewis v. Downs*, 774 F.2d 711, 715 (6th Cir. 1985)[3]

Three courts of appeals have held that the state of mind that meets the standard of deliberate indifference is sufficient to meet the standard for punitive damages. *See Rowlett v. Anheuser-Busch, Inc.*, 832 F.2d 194, 205 (1st Cir. 1987); *Walsh v. Mellas*, 837 F.2d 789, 801 (7th Cir.), *cert. denied*, 486 U.S. 1061 (1988); *Cooper v. Dyke*, 814 F.2d 941, 948 (4th Cir. 1987). As indicated earlier, Morris was acting with deliberate indifference to Hill's constitutional rights. Evidence revealed that Morris had direct knowledge that Hill was not receiving his prescribed medicine and that Morris authorized or at least knowingly acquiesced in this deprivation. Morris testified that he knew of the problems that Hill and his fellow inmates were having in properly obtaining their medicine, but he took virtually no steps to correct the situation. It is indisputable that not receiving proper medical care can be life threatening in many cases, and could have been in Hill's case. Morris's conduct reflected a callous disregard for Hill's constitutional rights that certainly could support a verdict for *some* punitive damages. We believe that the district court's decision to set aside the jury award of punitive damages, in effect a judgment notwithstanding the verdict, was in error.

VIII.

The district court's decision is **AFFIRMED** in all that Morris counts as error. On the issue of punitive damages raised by Hill, we **REVERSE** the district court's grant of judgment notwithstanding the verdict — called a "remittitur" by the district court — and remand the case for the district court

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[3] The correct standard to be applied in considering the issue of punitive damages under 1983 is the federal one; Hill correctly argues that the district court erred in applying the Ohio standard. The case cited by the district court to support that decision, *McDaniel v. Carroll*, 457 F.2d 968, 969 (6th Cir. 1972), *cert. denied*, 409 U.S. 1106 (1973), is inapposite to the instant case. For a discussion of the correct standard *see Rowlett v. Anheuser-Busch, Inc.*, 832 F.2d 194, 207 (1st Cir. 1987).

to approve an amount of punitive damages which is reasonably supported by the evidence.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

LAWRENCE HILL,
Plaintiff,

v. C-1-82-1521

RONALD MARSHALL, et al.,
Defendants.

ORDER

This matter is before the Court on Defendant Terry Morris' Motion for JNOV or in the alternative, Motion for a New Trial or for a Remittitur of the damages assessed.[1] In order to fully understand these motions, a brief substantive and procedural review is necessary.

In December, 1982, the Plaintiff, an inmate at the Southern Ohio Correctional Facility ("SOCF"), filed a 42 U.S.C. § 1983 action in which he alleged that he had received inadequate medical treatment from SOCF officials. Specifically, the Plaintiff alleged that he was denied his Tuberculosis medication for a one year period after arriving at the SOCF.[2]

This matter came before the Court for retrial as to liability on March 27, 1990.[3] After a four day trial, the jury returned

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[1] These motions and Plaintiff's responses are to be found in Documents 226, 227, 229 and 230.

[2] In July, 1981, while incarcerated in the Hamilton County, Ohio jail, the Plaintiff reacted positively to a Tuberculosis skin test. As a result, he was prescribed Vitamin B-6 and a drug called Isoniazid ("INH") for one year.

[3] A previous verdict in favor of all Defendants was reversed by the United States Court of Appeals for the Sixth Circuit. *Hill v. Marshall*, No. 86-3987 (6th Cir. Nov. 4, 1988).

a verdict for Defendant Jerry Wente and against Defendant Terry Morris. On April 2, 1990 the jury returned a verdict of $95,000 in compensatory damages and $900,000 in punitive damages against Defendant Terry Morris in his individual capacity. This matter is now before the Court on Defendant's various motions to set aside this verdict.

The United States Court of Appeals for the Sixth Circuit has set forth the standard a trial court should employ when reviewing a motion for new trial. It is well settled that regardless of the ground alleged in a motion for new trial, the ultimate guide in a trial court's review of that motion is its sound discretion. *TCP Industries, Inc. v. Uniroyal, Inc., et al.*, 661 F.2d 542 (6th Cir. 1981).

In ruling upon a motion for new trial based upon the ground that the verdict is against the weight of the evidence, a District Judge must compare the opposing proofs and weigh the evidence. *Id., quoting General American Life Insurance Company v. Central National Bank*, 136 F.2d 821 (6th Cir. 1943). It is the duty of the Judge to set aside the verdict and grant a new trial if he is of the opinion that the verdict is against the clear weight of the evidence. *Toth v. Yoder*, 749 F.2d 1190 (6th Cir. 1984); *Moran v. Johns-Manville Sales Corp.*, 691 F.2d 811 (6th Cir. 1982); *Bruner v. Dunaway*, 684 F.2d 422 (6th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1982). Courts are not free to reweigh the evidence and set aside the jury's verdict merely because the jury could have drawn different inferences or conclusions or because Judges feel that other results are more reasonable. *Id.; Tenant v. Peoria & P.U. Ry. Co.*, 321 U.S. 29 (1944); *Werthan Bag Corp. v. Agnew*, 202 F.2d 119, 122 (6th Cir. 1953). A jury verdict should be upheld so long as there is any competent and substantial evidence in the record to support it even if contradictory evidence was presented. *Alaniz v. San Isidio Independent School District*, 742 F.2d 207 (5th Cir. 1984); *Green v. Francis*, 705 F.2d 846 (6th Cir. 1983). Thus, while the District Judge has a duty to intervene in appropriate cases, the jury's verdict should be accepted if it is one which a reasonable jury could have reached. *Bruner*, 684 F.2d at 422. It is further well settled that the review of a District Court decision granting or

denying a new trial on the basis of the weight of the evidence may be predicated only upon an abuse of discretion. *TCP Industries, Inc.*, 661 F.2d at 542; *quoting, Duncan v. Duncan*, 377 F.2d 49 (6th Cir. 1967), *cert. denied*, 389 U.S. 913 (1967).

On the other hand, the standard for a motion for JNOV is akin to a motion for a directed verdict, whereby, the trial court may not weigh the evidence, pass on the credibility of the witnesses, nor substitute its judgment for that of the jury. Instead, the trial court must view "the evidence in a light most favorable to the party against whom the motion is made. . . ." *Ratliff v. Wellington Exempted Village Schools Bd. of Educ.*, 820 F.2d 792, 795 (6th Cir. 1987). Upon reviewing all of the evidence presented at trial in relation to the motions before the Court, this Court finds that a JNOV should not be granted. However, the Court finds that the award of punitive damages is unwarranted, and therefore, the Court orders a conditional new trial as to all the issues unless the Plaintiff accepts a remittitur of all the punitive damage award.[4] *Dimick v. Schiedt*, 293 U.S. 474, 483 (1934). (The successful party must be given the option of accepting the remittitur or having a new trial). The Court will consider the facts in relation to each motion in turn.

A. JNOV

The Defendant raises several arguments as to why the jury verdict should be overturned on JNOV. However, all of Defendant's contentions are factual in nature, and therefore, face a difficult burden. First, Defendant contends that there was insufficient evidence to show that plaintiff was deprived of his medication. Viewing the evidence in a light most favorable to the Plaintiff, the Court finds that there was more than sufficient evidence to present an issue of fact as to

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[4] The trial court is permitted to order a partial new trial where "it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice." *Gasoline Products Co., Inc. v. Champlin Refining Co.*, 283 U.S. 494, 500 (1930). In this case, the Court finds that the issue of punitive damages is so intertwined with liability that a separate trial as to damages is impossible.

this issue. During the trial, the Plaintiff himself testified that he never received his medication. In addition, there was sufficient circumstantial evidence which showed that the pill line was often closed and that the medication dispensing operation was unreliable. This objection is therefore overruled.

Secondly, the Defendant contends that "there was not sufficient evidence to show that Defendant's actions deprived Plaintiff of his INH or amounted to deliberate indifference to Plaintiff's medical needs." (Doc. No. 227, p.7). However, the record contains numerous facts from which a reasonable jury could conclude that the Defendant acquiesced to actions of personnel with whom he was in charge, which deprived the Plaintiff of his constitutional rights. There was evidence presented that the Defendant was aware that Mr. Hill was not receiving his INH and failed to act. There was also substantial evidence of a pervasive pattern of conduct by hospital personnel that prevented Mr. Hill from receiving his medication. The jury could have easily concluded that the Defendant knew of this conduct and failed to act, thereby being deliberately indifferent to Plaintiff's serious medical need. *See Alioto v. City of Shively, Ky.*, 835 F.2d 1173, 1175 (6th Cir. 1987)("At a minimum, a . . . plaintiff must show that a supervisory official at least implicitly authorized, approved or knowingly acquiesced in the unconstitutional conduct of the offending subordinate.")(citation omitted); *Hays v. Jefferson County, Ky.*, 668 F.2d 869, 874 (6th Cir. 1982), *cert. denied*, 459 U.S. 833 (1982). This objection is therefore overruled.

Next, the Defendant contends that "there was not sufficient evidence to show that Defendant in his supervisory capacity acted with deliberate indifference to Plaintiff's serious medical need." (Doc. No. 227, p.10). This is essentially a restatement of Defendant's previous challenge. There was ample evidence for the jury to find that the defendant acquiesced to conduct of his subordinates and therefore, he can be held directly liable for those actions as opposed to liable as a supervisor. This objection is therefore overruled.

Finally, the Defendant contends that "none of [his] alleged actions or failures to act were the proximate cause of the Plaintiff's injuries." (Doc. No. 227, p.19.). This is once again a factual issue for a jury to decide. Therefore, this objection is overruled. Because all of Defendant's arguments for a JNOV are factual in nature, this Court is unwilling to disturb the jury's findings. The motion for a JNOV is denied.

B. New Trial or Remittitur

Defendant also moves the Court to grant a new trial because of Plaintiff's counsel's misconduct and because the verdict is against the weight of the evidence. For the same reasons set forth above, the Court does not believe that a new trial is warranted as to liability. In the alternative, the Defendant moves the Court for a remittitur of all or part of the damages claiming that Plaintiff's counsel inflamed the jury and that the verdict is so clearly excessive that the jury was clearly "swept away by passion, prejudice and sympathy." The Court is of the belief that the quantity of evidence that related to the medical services as a whole prejudiced the jury into an award of punitive damages. In reviewing the evidence presented at trial, the Court finds no evidence that Defendant's conduct rose to the level of malice or willfulness required for an award of punitive damages.

It is well settled that punitive damages may be awarded in civil rights actions. *Carey v. Piphus,* 435 U.S. 247, 257 n.11 (1977); *McDaniel v. Carroll,* 457 F.2d 968, 969 (6th Cir. 1972). However, as the jury was instructed,[5] the Plaintiff must

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[5] Punitive damages may be awarded for some acts. Punitive damages, however, may not be awarded unless there is some compensatory damage award.

Unlike compensatory damages which are intended to make a party whole, punitive damages are intended to punish a wrongdoer and to discourage others from committing similar acts. (footnote omitted).

For the plaintiff to recover punitive damages, he must have shown by a preponderance of the evidence, egregious conduct by defendants or willfulness or malice. (footnote omitted). Intentional violation of federal law is also sufficient to warrant punitive damages. (footnote omitted).

have shown by a preponderance of the evidence, egregious conduct by defendants or willfulness or malice to recover punitive damages. *Wolfel v. Bates*, 707 F.2d 932, 934 (6th Cir. 1983). The actual malice necessary to recover punitive damages may be defined as:

> (1) that state of mind under which a persons conduct is characterized by hatred, ill will or a spirit of revenge or (2) a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm.

Preston v. Murty, 32 Ohio St. 3d 334, 512 N.E.2d 1174 (1987).[6]

Much of the circumstantial evidence introduced during trial by the Plaintiff was merely an indictment of the SOCF medical facility and its staffing shortages which were beyond Mr. Morris' control.[7] Based upon a review of the briefs and

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[5] *Footnote 5 cont.*

Actual malice may take the form of the defendant's express ill will, hatred or spirit of revenge, or the form of reckless, willful or wanton behavior which can be inferred from surrounding circumstances. (footnote omitted).

The malice must have existed at the time of the acts in question, but its existence may be inferred from conduct and surrounding circumstances. (footnote omitted).

If you ward punitive damage, the amount should be fair and reasonable under all the facts and circumstances. It should not be excessive, nor actuated by passion or prejudice. The amount of punitive damages rests in your sound judgment and should be determined from all the evidence in the case.

In determining an award, if any, for punitive damages, you may take the financial condition of a defendant in consideration.

The foregoing statements regarding punitive damages are not to be construed as a direction to award or not to award such damages. An award, if any, is for you alone to make.

[6] Courts may rely upon state laws on the issue of damages where it better serves the policies expressed in the federal statutes in civil rights cases. *McDaniel*, 457 F.2d at 969.

[7] See the testimony of Shirley Pope regarding an evaluation of the medical services at the SOCF. (Doc. No. 204).

the available trial transcripts, the Court is of the opinion that there is insufficient evidence to support an award of punitive damages against Mr. Morris.

IT IS SO ORDERED.

/s/ Carl B. Rubin

Carl B. Rubin, Judge
United States District Court

No. 86-3987

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LAWRENCE HILL, Plaintiff-Appellant,	:	
v.	:	**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO**
RONALD C. MARSHALL; T. L. MORRIS: and LT. WENTE, Defendants-Appellees.	:	

BEFORE: **JONES AND GUY,** Circuit Judges; and **HILLMAN,** Chief District Judge. *

Per Curiam. In December 1982, Plaintiff-appellant Lawrence Hill, a prisoner at the Southern Ohio Correctional Facility ("SOCF"), filed a 42 U.S.C. § 1983 (1982) action which alleged that he had received inadequate medical treatment from SOCF officials. He named as defendants Ronald Marshall, then SOCF Superintendent; Terry Morris, then Deputy Superintendent of Treatment of SOCF; Jerry Wente, then SOCF Infirmary Administrator; and James Rhodes, the Governor of Ohio. Defendants Marshall and Rhodes were dismissed as party defendants by the district court in a June 23, 1986 order. Hill does not appeal that order. A jury trial resulted in a general verdict in favor of the remaining defendants. Hill then filed a motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. In the instant appeal, Hill challenges the district court's denial of that motion. For the reasons that follow, we reverse the decision of the district court and remand for a new trial.

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* Honorable Douglas W. Hillman, United States District Court for the Western District of Michigan, sitting by designation.

In July 1981, while incarcerated in the Hamilton County, Ohio jail, Hill reacted positively to a Tuberculosis skin test. As a result of this test, the physician for the Hamilton County Jail prescribed Vitamin B-6 and a drug called Isoniazid ("INH") for Hill for one year. Hill was transferred to another facility on July 27, 1981. The physician at that facility ordered that Hill's medication continue. On October 1, 1981, Hill was transferred to SOCF. Hill's medical file, which accompanied him to SOCF, indicated that he was to take INH and Vitamin B-6 for one year. His medication, however, was confiscated upon his arrival at SOCF.

Hill filed a pro se section 1983 action on December 20, 1982 in the United States District Court for the Southern District of Ohio. He alleged that his medication was never returned and that although he went to the "pill line" two times each week, he never received his medication. The defendants filed a motion to dismiss pursuant to Fed. R. Civ. P. (12(b)(6) on January 12, 1983 and a motion for summary judgment on August 5, 1985. Both motions were denied.

Hill, still acting pro se, moved for a default judgment on December 2, 1985. On April 11, 1986 the defendants, without having responded to the plaintiff's motion for default judgment, filed a motion for leave to file their answer to Hill's complaint. The motion came five months after the answer was due and two and one half months before trial. The defendants' excuse was "administrative oversight," Although the response period of twenty-two days had not run nor was notice given to Hill's then court appointed counsel, the motion was granted. On April 21, 1986, Hill's counsel filed a motion opposing defendants' motion for leave. The following day, after learning that the defendants' motion has been granted, Hill's counsel filed a motion for reconsideration of the district court's decision. Plaintiff's motions were denied. On April 23, 1986, over four months after Hill filed his motion for default judgment, the defendants responded to this motion.

The jury trial began on July 2, 1987. After approximately five days of trial, the jury returned a general verdict in favor

of all of the defendants. Following the verdict, he moved for judgment notwithstanding the verdict or for a new trial. Hill made several assertions in this motion. First, he claimed that the district court abused its discretion in allowing the defendants leave to file an answer. Hill also claimed that the district court erred in admitting testimony which related to previously destroyed evidence. His third assertion was that the trial court abused its discretion in refusing to admit evidence showing defendants' pervasive pattern of failing to give adequate medical attention to inmates. Finally, Hill claimed that the district court abused its discretion in admitting evidence detailing the specific nature of his prior convictions. We will treat these arguments seriatim.

II.

Hill asserts that since the defendants' only excuse for failing to file an answer to the complaint was "administrative oversight," the court abused its discretion in allowing the defendants leave to file an answer. Under Fed. R. Civ. P. 6(b)(2), courts may not permit late filings unless they are the result of excusable neglect. This matter is committed to the trial court's discretion. In this case, Hill did not state that his case had been prejudiced as a result of the defendants' delay in filing an answer and, in fact, he did not give notice to anyone that an answer had not been filed. In addition, the defendants' attorneys attached an affidavit explaining why they failed to file a timely answer. Based on these facts, we cannot say that the trial court abused its discretion in allowing the answer to be filed. The district court's ruling as to the issue is therefore affirmed.

III.

Hill's second argument is that the district court erred in admitting testimony regarding information contained in the prison nurses' medication worksheets. He claims that the worksheets should have been preserved as critical documents but instead were destroyed by the defendants. The defendants note that the nurses testified that the medication worksheets are not a part of the medical records

but are used by the nurses to administer medication. After the "stop date" on a worksheet is reached, the sheet is discarded. Since Hill's stop date for taking medication was several months before he filed his lawsuit, the defendants claim that his worksheet was discarded pursuant to this procedure.

The trial judge granted Hill permission to make an argument to the jury concerning why he felt the worksheet was discarded. The court denied Hill's request for a jury instruction on the allegedly bad faith destruction of the worksheets because the court felt that the defendants had already explained the reasons for the destruction of the worksheets. Since Hill did not preserve the issue of sufficiency of the evidence, that issue is not before this court. Based on the evidence before us, we conclude that the trial court did not abuse its discretion in admitting this evidence and its ruling on this point is therefore affirmed.

IV.

Hill's next argument is that his case was prejudiced because the district court refused to allow him to introduce evidence concerning the defendants' alleged pervasive pattern of denying or failing to provide SOCF prisoners their medication. Neither party had written documents to support their contentions. The district court allowed Hill to testify that he did not receive his medication. The defendants used circumstantial evidence to indicate that he did receive his medication. Hill sought to introduce further evidence to rebut the defendants' circumstantial evidence and to establish a pervasive pattern of neglect by the prison officials.

The excluded evidence included: an evaluation of SOCF's medical services, which was performed by a committee of the Ohio General Assembly; lawsuits and grievances which had been filed by other inmates at SOCF; and reports by SOCF medical committees which described the problems with medication distribution. The Supreme Court and this Circuit have approved the introduction of such evidence to establish a pervasive pattern of conduct that could justify

imposing liability on defendants in civil rights actions based on their capacity as supervisors. *Rizzo v. Goode*, 423 U.S. 362, 373-76 (1976); *Hays v. Jefferson County*, 668 F.2d 869 (6th Cir. 1982), *cert. denied*, 459 U.S. 833 (1982). As the only evidence that the district court permitted Hill to introduce was his own testimony, it was virtually impossible for Hill to rebut the defendants' circumstantial evidence. In addition, the trial court's ruling further exacerbated the difficulties Hill faced in satisfying the burden of proof on the issue of supervisory liability. We make no judgment at this time as to the admissibility of the excluded evidence. We conclude, however, that the district court abused its discretion in categorically denying admission of Hill's evidence.

V.

Hill's final argument is that the district court erred in allowing evidence, for impeachment purposes, regarding the specific nature of his rape convictions. Because we conclude that Hill is entitled to a new trial based on the district court's categorical denial of admission to Hill's evidence, we need not address this issue.

VI.

For the foregoing reasons, we **REVERSE** the district court's denial of plaintiff's motion for judgment notwithstanding the verdict and **REMAND** for a new trial.

ISSUED AS MANDATE: November 29, 1988
COSTS: None

Nos. 90-3803/3826/3923

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LAWRENCE HILL,	)	FILED
Plaintiff-Appellee/Cross-	)	July 23, 1992
Appellant (90-3803-3826)	)	LEONARD GREEN
Plaintiff-Appellant (90-3923),	)	Clerk
	)	
v.	)	
	)	
TERRY MOORIS,	)	
Defendant-Appellant/Cross	)	
Appellee (90-3803-3826)	)	
Defendant-Appellee (90-3923),	)	
	)	
WENTE, LT.,	)	
Defendant (90-3803-3826)	)	
Defendant-Appellee (90-3923)	)	

BEFORE: MARTIN and JONES, Circuit Judges; and BROWN, Senior Circuit Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge or this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

Supreme Court, U.S.
FILED
DEC 29 1992
OFFICE OF THE CLERK

No. 92-718

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

TERRY MORRIS,

Petitioner,

v.

LAWRENCE HILL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT LAWRENCE HILL

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QUESTION PRESENTED

1. IS THERE A CONSTITUTIONALLY COGNIZABLE "HARM" UNDER THE EIGHTH AMENDMENT WHERE A PRISON OFFICIAL DEPRIVES AN INMATE OF HIS PRESCRIPTION MEDICINES, THUS PREVENTING THE INMATE FROM REDUCING HIS RISK OF DEVELOPING ACTIVE TUBERCULOSIS BY APPROXIMATELY 90% AND RESULTING IN SEVERE EMOTIONAL DISTRESS TO THE INMATE?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-718

TERRY MORRIS,

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v.

LAWRENCE HILL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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BRIEF IN OPPOSITION FOR RESPONDENT LAWRENCE HILL

OPINIONS AND JUDGMENTS BELOW

The Opinion of the Sixth Circuit in *Hill v. Marshall,* Case No. 86-3987, November 4, 1988, reversing and remanding the district court on appeal from the first jury verdict in favor of Defendants, is reproduced at Petitioner's Appendix A-23.

The post-trial Order of the United States District Court for the Southern District of Ohio, Western Division, entering Judgment for Plaintiff on August 3, 1990, is reproduced at Petitioner's Appendix A-16.

The judgment of the United States Court of Appeals for the Sixth Circuit, filed on May 1, 1992, in Case No. 90-3803, is reported as *Hill v. Marshall*, 962 F.2d 1209 (6th Cir. 1992), and is reproduced at Petitioner's Appendix A-1.

The Order of the Sixth Circuit denying Defendant's Petition for Rehearing filed July 23, 1992 is reproduced at Petitioner's Appendix A-28.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on May 1, 1992 (Petitioner's Appendix A-1). A petition for rehearing was denied on July 23, 1992, (Petitioner's Appendix A-28). The petition for a writ of certiorari was filed on October 21, 1992.

CONSTITUTIONAL PROVISION INVOLVED

This case involves the following constitutional provision: U.S. Const. amend. VIII [1791]

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT OF THE CASE

In July, 1981, Respondent Lawrence Hill ("Mr. Hill") reacted positively to a PPD tuberculosis skin test, indicating that the tuberculosis bacteria was in his body. The positive result did not signify, however, that Mr. Hill had active tuberculosis in his lungs, but rather that the tuberculin bacteria were in his body and that without prevention they could become active.

In the summer of 1981, the physician for the Hamilton County Jails prescribed that Mr. Hill receive the drug INH, 300 milligrams a day, for one year. If a patient receives INH as prescribed, then the chances of the tuberculosis bacteria turning into active tuberculosis are reduced by approximately 90%. If the patient receives INH for only part of the prescribed one year period, however, he may actually be in worse condition than if he did not receive the INH at all because the tuberculosis bacteria could then become resistant to treatment by INH.

In July of 1981, Mr. Hill began taking his INH for what was supposed to be a one year period. Two months later, however, on October 1, 1981, Mr. Hill was transferred to the Southern Ohio Correctional Facility (''SOCF''). Upon arrival at SOCF, Mr. Hill's INH was confiscated. Mr. Hill's medication was never returned and he was never issued additional medication.

Mr. Hill attempted unsuccessfully to get medication at sick call and at the pill line (where prisoners were supposed to receive daily medications). Mr. Hill complained in writing to Petitioner Terry Morris (''Morris''), then Deputy Superintendent of Treatment at SOCF. Morris ignored Mr. Hill's request for his prescription medicines.

Morris admitted at trial that under his tenure as Deputy Superintendent of Treatment, he was aware of a pervasive pattern of failing to pass out medications to inmates during the time period when Mr. Hill was supposed to be receiving his INH on a daily basis. Morris permitted this pervasive pattern to extend to the point where (1) the pill line was closed on a regular basis; (2) the SOCF pharmacist was not properly filling prescriptions such as Mr. Hill's; (3) prescriptions were written, but paperwork was sometimes not followed up on so that an inmate actually received his medicine; and (4) the head nurse, who wrote Mr. Hill's prescription and to whom Mr. Hill

had complained that he was not receiving his medicine, was engaged in a well-known practice of tearing up prescriptions and altering prescriptions without a doctor's approval.

Despite Morris' knowledge of these life threatening actions taking place under his supervision, he did virtually nothing to correct any of these problems. Indeed, Morris admitted that he may well have referred inmates' complaints about not receiving their prescription medicines to the very nurse who he knew was tearing up prescriptions and altering prescriptions without a doctor's approval.

Morris' deprivation of Mr. Hill's prescription medicines (1) prevented Mr. Hill from utilizing INH to reduce his risk of developing active tuberculosis by approximately 90%, and (2) caused Mr. Hill to suffer severe emotional distress.

Hill filed this pro se § 1983 action on December 20, 1982, alleging that Morris' deliberate indifference to his serious medical needs constituted a violation of the Eighth Amendment. The case went to trial in July of 1986 against Morris and one other prison official, with Hill represented by a court-appointed attorney. The jury returned a general verdict in favor of Morris and the other defendant. Hill moved for judgment notwithstanding the verdict or, alternatively, for a new trial. The district court denied the motion and, subsequently, the United States Court of Appeals for the Sixth Circuit reversed that ruling in November 1988.

Upon remand, the case went to trial in March 1990. At trial, Mr. Hill and another inmate testified about the excruciating mental anguish Mr. Hill suffered as a result of having his prescription medicines taken away. Specifically, Mr. Hill was unable to concentrate, could not sleep, became depressed and began talking to himself in fear that he would die without the anti-tuberculin medicines the prison doctor had prescribed. Dr. William Krall, a board certified physician in both internal

medicine and pulmonary disease, testified that had Mr. Hill received his INH as prescribed, he would have been able to reduce his risk of contracting active tuberculosis by approximately 90%.

In response to special interrogatories, the jury found that Morris had been deliberately indifferent to Mr. Hill's serious medical needs. On this ground, the jury returned a unanimous verdict finding Morris liable to Mr. Hill for $95,000 in compensatory damages and $900,000 in punitive damages.

Morris moved for judgment notwithstanding the verdict or for a new trial and for remittitur of damages. The district court conditionally granted Morris' motion for a new trial unless Mr. Hill would agree to take a remittitur of the entire amount of the punitive damages award. Mr. Hill accepted the remittitur under protest, reserving the right to appeal.

Morris appealed his liability and the denial of his motion for judgment notwithstanding the verdict on various claims of error in August 1990. Mr. Hill cross-appealed the remittitur. These appeals were consolidated before the Court of Appeals for the Sixth Circuit which affirmed the denial of Morris' motion for judgment notwithstanding the verdict. Specifically, the court found that there was ample evidence in the record to support the jury's finding that Morris had been deliberately indifferent to Mr. Hill's serious medical needs resulting in constitutionally cognizable "harm" in that Mr. Hill had been prevented from reducing his risk of developing active tuberculosis by approximately 90% and Mr. Hill had suffered severe mental anguish.

Further, the Sixth Circuit reversed and remanded the trial court's "remittitur" of all punitive damages. The Sixth Circuit found that the district court's decision to set aside the jury award of punitive damages was in effect an erroneous

grant of a judgment notwithstanding the verdict. Morris' conduct, according to the Sixth Circuit, reflected a callous disregard for Hill's constitutional rights that certainly supported a verdict for at least some punitive damages. The Sixth Circuit therefore remanded the case to the district court with instructions to enter an amount of punitive damages that is reasonably supported by the evidence.

REASONS FOR DENYING THE WRIT

Mr. Hill agrees that in order to establish a claim for damages under the Eighth Amendment, a prisoner must demonstrate that he has suffered some harm or injury. Contrary to Morris' representations, however, Mr. Hill demonstrated two constitutionally cognizable injuries at trial that resulted from Morris' deliberate deprivation of Mr. Hill's anti-tuberculin medications.

First, Mr. Hill proved at trial that he suffered severe mental anguish when Morris maliciously deprived him of his prescription medicines, medicines that Mr. Hill had been told could be the difference between life and death.[1] Second, Morris' deliberate indifference prevented Mr. Hill from using INH to reduce his risk of developing active tuberculosis by approximately 90%.

These injuries, alone or collectively, amply support a cognizable harm for purposes of establishing a claim for damages under the Eighth Amendment. Under the circumstances, this is a garden-variety Eighth Amendment case where Morris' only real complaint is that he lost. The case presents no

[1]In his petition, Morris completely omits any reference to Mr. Hill's severe emotional distress. As addressed more fully below, because this injury, in and of itself, is a cognizable harm under the Eighth Amendment, this Court will not need to address the questions sought to be raised by the petition.

important legal question which requires intervention by this Court, nor is there a conflict of decisions with other appellate courts. Moreover, because the decision below turned on the unique facts involved, this case is likely to affect few other litigants. The petition should therefore be denied.

I. There Is No Need To Address The Questions Presented By The Petition Because Mr. Hill Suffered A Constitutionally Cognizable Harm – Severe Emotional Distress – As A Direct Result Of Morris' Deliberate Indifference.

The petition omits any reference to the fact that Mr. Hill proved at trial that he suffered severe mental anguish as a result of Morris' indifference to his serious medical needs.[2] It is only by ignoring Mr. Hill's severe emotional distress that the questions presented by the petition can even be considered.

Mr. Hill concedes that a prisoner must demonstrate that he has suffered some harm in order to establish a claim for damages under the Eighth Amendment. No precedent of this Court, however, stands for the proposition that psychological or emotional harm is not cognizable for constitutional purposes. *Hudson v. McMillian*, __ U.S. __ 112 S.Ct. 995, 1004 (1992) (Blackmun, concurring). Indeed, if anything, this Court's precedent is to the contrary. *Id.* (citing *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972) (recognizing Article III standing for "aesthetic" injury); *Brown v. Board of Education*, 347 U.S. 483, 494 (1954) (identifying school children's feelings of psychological inferiority from segregation in the public

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[2]The Sixth Circuit's decision below recognized that Mr. Hill "suffered a great deal of mental anguish. . . ." Petitioner's Appendix at A-11.

schools)). *See also, Carey v. Piphus*, 435 U.S. 247, 263-64 and n.20 (1978); *Hudson*, 112 S.Ct. 995 at 1009 (Thomas, J., dissenting) ("That is not to say that the injury must be, or always will be, *physical*.") (emphasis in original).

Thus, because Mr. Hill proved to the satisfaction of the jury that he suffered a constitutionally cognizable injury — severe emotional distress — it is unnecessary for this Court to even consider the questions presented by the petition.

The lower courts have also consistently recognized emotional distress as a compensable injury in a § 1983 action. *See, e.g., Doe v. District of Columbia*, 697 F.2d 1115, 1124 (D.C. Cir. 1983) ("In other words, plaintiffs are entitled to compensation for any physical injuries, pain and suffering, [and] emotional distress . . . proximately caused by the defendants' unconstitutional conduct."); *Crawford v. Garnier*, 719 F.2d 1317, 1324 (7th Cir. 1983); *Cerjan v. Fasula*, 539 F. Supp. 1226, 1235 (N.D.Oh. 1981); *Rodriguez v. Comas*, 888 F.2d 899, 906 (1st Cir. 1989); *See generally*, Restatement (Second) of Torts §§ 46, 905(b)(1977).

II. Even Assuming *Arguendo* That Mr. Hill's Severe Emotional Distress Is Not A Constitutionally Cognizable Injury, Mr. Hill Still Suffered A Cognizable Injury Under The Eighth Amendment In That Morris' Indifference To His Serious Medical Needs Prevented Him From Utilizing The Medications Prescribed By The Prison Doctor To Reduce His Risk Of Developing Active Tuberculosis By Approximately 90%.

In his petition, Morris argues that Mr. Hill has not sustained a constitutionally cognizable injury because his risk of developing active tuberculosis was not altered by Morris'

indifference in depriving him of his INH medicines. Petition at 10-11. As will be demonstrated below, the factual and legal bases of Morris' argument are erroneous.

First, from a factual standpoint, Morris' deliberate deprivation of Mr. Hill's prescription medicines caused injury to Mr. Hill in that Mr. Hill was deprived of the opportunity to reduce the likelihood of developing active tuberculosis by approximately 90%. In other words, but for Morris' outrageous conduct, Mr. Hill's odds of avoiding the onslaught of tuberculosis would have been 90% better. Moreover, there was evidence at trial that Morris' unconstitutional indifference may have resulted in making the tuberculosis bacteria in Mr. Hill's body resistant to INH, thus further exacerbating the situation.

Second, from a legal standpoint, Morris relies on *Clemmons v. Bohannon*, 956 F.2d 1523, 1527 (10th Cir. 1992) for the proposition that "the mere possibility of developing a future disease is not a cognizable harm for the purpose of establishing an Eighth Amendment violation. . . ." Petition at 11. *Clemmons* involved a civil rights action arising out of an inmate's involuntary subjection to tobacco smoke. The *Clemmons* Court concluded that the Eighth Amendment would not encompass Clemmons' claim because he "does not have a *serious medical need;* he has alleged no adverse physical symptoms from cigarette smoke different from those suffered by everyone in society."[3] 956 F.2d at 1527 (emphasis in original). The Court did not define "serious medical needs", but instead relied on a number of cases for examples of what constitutes serious medical needs.

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[3]The deliberate indifference standard for medical care requires that the inmate's illness or injury be a "serious" one. *Clemmons*, 956 F.2d at 1527 (citing *Estelle v. Gamble*, 429 U.S. 97, 104-05, 97 S.Ct. 285, 291, 50 L.Ed.2d 251 (1976)).

One such case cited by the *Clemmons* Court provides a definition that is useful in examining the case at bar:

> A medical need is serious if it is 'one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention.'

Ramos v. Lamm, 639 F.2d 559, 575 (1980) *quoting Laaman v. Atlgemoe*, 437 F. Supp. 269, 311 (D.N.H. 1977). *Accord, Monmouth County Correctional Institution Inmates v. Lanzaro*, 834 F.2d 326, 347 (3d Cir. 1987); *Tillary v. Owens*, 719 F. Supp. 1256, 1302 (W.D.Pa. 1989); *West v. Keve*, 571 F.2d 158, 162-63, n.6 (3d Cir.).

This definition reveals why *Clemmons* is inapposite. In *Clemmons*, the prisoner had no prescriptions or doctor's order requiring that he not be exposed to tobacco smoke. Hill, on the other hand, had a doctor's prescription for the INH that Morris deprived him of. Obviously, the prison doctor who prescribed INH to reduce the chances of Mr. Hill contracting tuberculosis felt that Mr. Hill's medical needs were serious. Moreover, in response to answers to special interrogatories at trial, the jury in the case at bar confirmed that Mr. Hill's medical needs were serious.

Morris now asks this Court to rewrite the definition of "serious" such that a doctor's reasoned medical judgment would not be considered. This Court should decline Morris' invitation.

This Court should also decline Morris' invitation (made in the course of discussing the second question presented) to legislate a percentage threshold such that before the increased risk of contracting a deadly disease would be a constitutionally cognizable harm, the inmate would have to prove that

he was more likely than not going to contract the disease. Thus, Morris argues that even if a doctor opines that Mr. Hill has a 50% probability of contracting active tuberculosis as a result of Morris' conduct, Mr. Hill has no constitutionally cognizable injury. Morris relies solely on state common law for this proposition. Petition at 11.[4]

This Court has made it clear, however, that state common law does not control in a § 1983 action. *Wilson v. Garcia*, 471 U.S. 261 (1985); *Burnett v. Grattan*, 468 U.S. 42 (1984). It is only if no federal remedy exists that a court should even consider state common law. *Id.*; 42 U.S.C.§ 1988, *Gordon v. Norman*, 788 F.2d 1194, 1199 (6th Cir. 1986) ("Federal standards govern the determination of damages under the civil rights statutes").

In a § 1983 action involving denial of medical care in violation of constitutional rights, the federal common law is that an inmate is entitled to recover damages for undue suffering or "the threat of tangible residual injury." *Westlake v. Lucas*, 537 F.2d 857, 860 (6th Cir. 1976) *cited with approval in Estelle v. Gamble*, 429 U.S. 97, 105 n.11 (1976). Further, "[i]n making this determination the trier of fact should consider the practicalities of the situation including the extent of the injury, the realistic possibilities of treatment, and the *possible consequences* to the prisoner of failing to provide immediate medical attention." *Id.* at 860 n.4 (emphasis added.)

The case of *Clark v. Taylor*, 710 F.2d 4 (1st Cir. 1983) illustrates the consistent federal common law that was correctly applied by the Sixth Circuit in the case at bar. In *Clark*, a prisoner brought a § 1983 action for violation of his constitutional rights against the prison warden and others for their

[4]The petition does not explain why this issue is important enough to warrant review on its own, and there is plainly no conflict between the Circuits.

failure to prevent the exposure of the prisoner to a known carcinogen. After a jury verdict against defendants, defendants appealed, challenging the jury's award of $60,000 in compensatory damages for, *inter alia*, plaintiff's increased risk of developing bladder cancer. The First Circuit Court of Appeals affirmed the district court's award of damages for increased risk based on plaintiff's expert who "testified that because of plaintiff's exposure to benzidine, his risk of developing bladder cancer had increased from one to ten thousand to one in ten." *Id.* at 14.

Clearly, plaintiff did not prove that he had a greater than 50% probability of developing bladder cancer. At most plaintiff's evidence showed he had only a 10% chance of ever developing the disease. Nevertheless, both the district court and the Court of Appeals found plaintiff's increased risk to be compensable under federal law. *See also, Todaro v. Ward*, 565 F.2d 48, 51 (2d Cir. 1977) (duty to epileptic prisoner begins before inmate chokes on tongue); *Glick v. Henderson*, 855 F.2d 536, 539-40 (8th Cir. 1988) (inmates would have an Eighth Amendment claim if they faced a "pervasive risk" of contracting AIDS and prison officials did not "reasonably respond to that risk.").[5]

Finally, in a last ditch attempt to have this Court take interest in the case at bar, Morris claims that "the Sixth Circuit's opinion will open the floodgates to speculative and

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[5]These decisions are correctly decided since the protection of constitutional rights requires that compensation be made for actual injuries. As the D.C. Circuit Court of Appeals has stated:

> [I]n cases involving constitutional rights, compensation 'should not be approached in a niggardly spirit. It is in the public interest that there be a reasonably spacious approach to a fair compensatory award for denial or curtailment of the right * * *.'

Halperin v. Kissinger, 606 F.2d 1192, 1208 (D.C. Cir. 1979) (footnotes omitted).

fraudulent claims, [and] will overburden the judiciary leading to a greater drain on limited judicial resources. . . .''. Petition at 6, 11-12.

This standard petitioner's argument was best answered by Justice Blackmun in his concurring opinion in *Hudson v. McMillian*, 112 S.Ct. 995, 1003 (1992) (citations omitted):

> This audacious approach to the Eighth Amendment assumes that the interpretation of an explicit constitutional protection is to be guided by pure policy preferences for the paring down of prisoner petitions. Perhaps judicial overload is an appropriate concern in determining whether statutory standing to sue should be conferred upon certain plaintiffs. But his inherently self-interested concern has no appropriate role in interpreting the contours of a substantive constitutional right.

Morris' cry of ''floodgates'' cannot transform a straightforward Eighth Amendment case into one of national significance. Morris' problem with the decision below is not that it may lead to a flood of future litigation; rather, Morris' real problem is that he cannot accept the well-reasoned judgment of the jury, the district court, and the Court of Appeals.

CONCLUSION

"A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only when there are special and important reasons therefor." Rule 10, Rules of the Supreme Court of the United States. Petitioners have failed to point out any special and important reasons which would compel this Court to review the instant case and from a review of the record and the decision below, it is clear that no such reasons exist. Accordingly, the Petition for Writ of *Certiorari* is not well taken and should be denied.

Respectfully submitted,

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December 31, 1992

(3)

Supreme Court, U.S.
FILED
JAN 11 1993
OFFICE OF THE CLERK

CASE NO. 92-718

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

TERRY MORRIS,

Petitioner,

v.

LAWRENCE HILL,

Respondent.

On Petition For a Writ of Certiorari From The United States Court of Appeals for the Sixth Circuit

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PETITIONER'S REPLY BRIEF

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REPLY ARGUMENTS

I. INTRODUCTION

In his Brief In Opposition, ("Brief"), Mr. Lawrence Hill ("Hill"), elects not to address the two issues raised in Mr. Terry Morris's Petition For Writ Of Certiorari ("Petition"). Instead, Mr. Hill identifies and discusses two other issues, which are ancillary to the core issues raised in Mr. Morris's Petition. Confronted with this unorthodox response, it is necessary to address the two issues Mr. Hill raises.

II. PRINCIPLES OF LAW

Understanding of the two issues raised by Mr. Hill is enhanced if there is a recognition that his arguments, although not specifically mentioned in his Brief, are based primarily on two separate and distinct substantive state tort law claims.

"Fear of contracting a future disease" is the first state tort claim which Hill discusses.[1] The standard of proof that most courts require in this type of claim is that the plaintiff prove that he has suffered mental anguish from the reasonable fear that his existing injury will lead to the manifestation of a future disease. In establishing reasonableness, plaintiff need not prove with a high degree of likelihood that the feared potential disease will actually manifest itself. *See Sterling v. Velsicol,* 855 F.2d 1188, 1205-07 (6th Cir. 1988) (applying Tennessee law); *Wetherhill v. University of Chicago,* 565 F. Supp. 1553, 1559-61 (N.D. Ill. 1983) (applying Illinois law).

"Increased risk of developing a future disease" is the second state tort claim which Hill discusses.[2] The standard

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[1] Hill claims that severe emotional distress is a cognizable injury under the Eighth Amendment. Brief at 7-8.

[2] Hill claims that his loss of chance to reduce his risk of developing tuberculosis is a cognizable injury under the Eighth Amendment. Brief at 8-13. This assertion is really an increased risk of future harm claim couched in terms of loss of chance claim.

of proof that most courts require in this type of claim is that plaintiff prove that he has an existing injury and that he also prove with reasonable medical certainty (greater than fifty percent) that the predicted future disease will actually manifest itself. *See Sterling v. Velsicol Chemical Corp.*, 855 F.2d at 1204-05 (applying Tennessee law); *Wilson v. Johns-Manville Sales Corp.*, 684 F.2d 111, 119 (D.C. Cir. 1982) (applying District of Columbia law); *Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394, 412 (5th Cir.) (applying Mississippi law), *cert. denied*, 478 U.S. 1022 (1986).

III. THE FEAR OF CONTRACTING A FUTURE DISEASE IS NOT A COGNIZABLE HARM FOR THE PURPOSE OF ESTABLISHING AN EIGHTH AMENDMENT DEPRIVATION OF MEDICAL CARE CLAIM.

In his Brief (at 7-8), Mr. Hill claims that serious emotional distress (fear of contracting a future disease) is a cognizable injury under the Eighth Amendment. First, it must be noted that Mr. Hill's theory of recovery in the trial court was not predicated on this state substantive law claim.[3] Second, based on Mr. Hill's actual risk factor (ranging from twenty-three percent to a fraction of one percent) of developing tuberculosis, Mr. Hill did not establish the reasonableness

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[3] Prior to the commencement of the trial, the trial court granted Mr. Morris's motion *in limine*, prohibiting Mr. Hill from introducing at trial any evidence on fear of developing a future disease claim, and any evidence on increased risk of harm for developing a future disease claim for the specific purpose of predicating recovery on the bases of these two state substantive law claims. The trial court also ruled that Mr. Hill could introduce such evidence (fear and risk) for the purpose of establishing mental anguish as an element of compensatory damages accompanying an existing injury. Following oral argument, the trial court instructed the jury on the standard elements of compensatory damages. Those elements included mental anguish and emotional distress. The trial court's rulings are in conformity with this Court's decisions in *Carey v. Piphus*, 435 U.S. 247, 264 (1978) and *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 307 (1986), and also in conformity with the Sixth Circuit's decision in *Parrish v. Johnson*, 800 F.2d 600, 611 (6th Cir. 1986).

of his fear. Hence, he has failed to establish a cognizable fear of contracting a future disease claim. Third, there isn't any sensible reason to elevate this substantive state tort to the level of a constitutional tort.

IV. AN INCREASED RISK OF DEVELOPING A FUTURE DISEASE IS NOT A COGNIZABLE HARM FOR THE PURPOSE OF ESTABLISHING AN EIGHTH AMENDMENT DEPRIVATION OF MEDICAL CARE CLAIM.

In his Brief (at 8-13), Mr. Hill claims that being deprived of an opportunity to reduce his risk of developing tuberculosis by up to ninety percent through the use of isoniazid ("INH") is a cognizable harm under the Eighth Amendment. This assertion is really an increased risk of developing a future harm claim couched in terms of a loss of chance claim. First, it must be noted that Mr. Hill's theory of recovery in the trial court was not predicated on this state substantive law claim. Second, the direct consequence of the deprivation is not an actual injury. Instead, the direct consequence of the deprivation is that Mr. Hill's risk of developing tuberculosis may be greater.[4] Thus, his increased risk is still a potential injury, not an actual injury.[5] Third, Mr. Hill has failed to demonstrate with reasonable medical certainty (greater than fifty percent) that he will develop tuberculosis in the future.[6] As a consequence, he has failed

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[4] The record indicates otherwise, indeed, "[i]f Mr. Hill did not, in fact, receive his INH, his risk would remain exactly the same." *See* Petition at 10.

[5] The Sixth Circuit erroneously concluded that: "Hill has suffered an actual injury, in that he was prevented by Mr. Morris's indifference to his medical needs from reducing his risk of developing tuberculosis by ninety percent." *Hill v. Marshall,* 962 F.2d 1209, 1215 (6th Cir. 1992) (A1).

[6] The Sixth Circuit erroneously concluded that: "Hill did not have to show more than a 50% risk of developing tuberculosis, only that his risk has increased due to the deprivation." *Hill v. Marshall,* 962 F.2d at 1214 (A-1). The Sixth Circuit's reliance on the case of *Clark v. Taylor,* 710 F.2d 4 (1st Cir. 1983) is misplaced. Id. at A-9. In *Clark,* the prison

to establish a cognizable increase of risk of future harm claim. Fourth, there isn't any sensible reason to elevate this substantive state tort to the level of a constitutional tort.

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[5] *Footnote 6 cont.*
inmate sought damages for his fear of developing cancer, not for any increased risk of cancer. The First Circuit affirmed the award of $60,000 in compensatory damages because it found that the inmate's fear of developing cancer was genuine.

CONCLUSION

The trial record discloses that this case was not tried as a fear of contracting a future disease claim, nor as a mere increased risk of developing a future disease claim. On appeal, however, the Sixth Circuit elevated a substantive state tort claim (mere increased risk of injury claim) to a cognizable constitutional tort action. The core issues involved in this case are identified and discussed in Mr. Morris's Petition. This court must decide these important constitutional issues now.

Petitioner submits that a writ of certiorari should therefore be issued to review the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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